IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 27TH NOVEMBER 2007 / 6TH AGRAHAYANA 1929

RSA.No. 988 of 2003(A)

AS.200/2000 of ADDL. DISTRICT COURT, NORTH PARAVUR
OS.516/1996 of PRINCIPAL SUB COURT,NORTH PARAVUR
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APPELLANT - APPELLANT - PLAINTIFF:

VELAYUDHAN S/O. KORAKUTAN,
THETTUMPARAMBATH, KALADY KARA,
MANIKKAMANGALAM VILLAGE, NOW RESIDING AT
ANCHUMANA PULICKAL VEETTIL, EDAPPALLY

BY SHRI VELAYUDHAN (PARTY-IN-PERSON)

RESPONDENTS - RESPONDENTS - DEFENDANTS 1 TO 3:
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1. MANOJ S/O. VELAYUDHAN, NEDUMPARAMBATH VEETTIL, KALADY KARA, MANICKAMANGALAM VILLAGE.

2. VINU, S/O. VELAYUDHAN, NEDUMPARAMBATH VEETTIL, KALADY KARAM MANICKAMANGALOAM VILLAGE.

3. ANUSU S/O. VELAYUDHAN,NEDUMPARAMBATH VEETTIL, KALADY KARA, MANICKAMANGALAM VILLAGE.

ADDITIONAL RESPONDENT IMPLEADED:
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4. STATE OF KERALA, REPRESENTED BY THE EXECUTIVE ENGINEER, P.W.D., K.S.T.P. MUVATTUPUZHA, SUB DIVISION, MUVATTUPUZHA.

IS IMPLEADED AS ADDITIONAL 4TH RESPONDENT IN THE STATUS AS TRANSFEREE PENDENTE LITE AS PER ORDER DATED 30.1.2006 IN I.A. NO.40/06.

R1 TO R3 BY ADV. SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM
R4 BY GOVERNMENT PLEADER SHRI BASANT BALAJI

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR ,J.

R.S.A.No.988 of 2003

Dated, this the 27th day of November, 2007

JUDGMENT

The plaintiff in O.S.No.511/1996 on the file of the Principal Sub Judge, North Paravur is the appellant. This Regular Second Appeal is filed challenging the concurrent findings of the courts below by which the suit filed by the appellant for partition was dismissed. Plaintiff who is a retired teacher filed a suit for partition alleging that the properties originally belonged to Kalady Devaswom and it was outstanding on lease with the plaintiff and his mother late Smt. Janaki. Plaintiff along with his mother applied for assigning the right, title and interest of the landlord and the Land Tribunal, Angamaly issued a certificate of purchase No.2158/ in the year 1972. As per the purchase certificate the property was comprised in Sy.No.231/6A, having an extent of 6 ½ cents (2.63 ares). But during re-survey the property was assigned a new sub division number as R.S.No.398/26 and the extent was shown as 3.25 ares (8 cents). The property is having actually 8 cents. Defendants are the children of plaintiff through his first wife which ended in divorce. One half of the property belonged to Janaki and the remaining half to the plaintiff. It was averred that plaintiff's mother along with his divorced wife and children were residing in the building situated in the suit property. Janaki bequeathed her one half right to defendants as per will No.14/1987 of Sreemoolanagaram Sub Registry and after her death the suit property was in the

joint possession of plaintiff and defendants. The suit was for partition of the one half right of the plaintiff.

2. Defendants initially filed a joint written statement contending that the description of the suit property was not correct. It was contended that the plot claimed by the plaintiff and the one in the possession of the defendants are distinct and separate plots. One plot having an extent of 6 ½ cents originally belonging to the plaintiff and his mother. There is another plot having an extent of 8.075 cents of land and the same exclusively belonged to Janaki. The averment that there was only one plot having an area of 8 cents (6 ½ cents and 1 ½ cents) was not true. The averment that the plaintiff obtained a certificate of purchase in respect of this 8 cents was also denied. Joint possession alleged was denied. It was averred that the property scheduled in the plaint was in the exclusive possession of Janaki and after her death defendants are in exclusive possession. Joint possession alleged was denied. The plaintiff was not entitled to get any share. It was contended that the plaintiff deserted the mother of the defendants while they were young and thereafter constantly harassing them. Subsequently they filed an additional written statement contending that the property obtained by the plaintiff and his mother under certificate of purchase No.2158/1972 was sold away and defendants obtained a certificate of purchase in respect of the property bequeathed in their favour by the grandmother. It was averred that the 8.075 cents of land is not partiable and if at all the plaintiff is entitled to get any relief that can only be in

respect of the property other than the one covered by the certificate of purchase obtained by the defendants.

3. Learned Subordinate Judge found that Ext.A1 certificate of purchase relied on by the plaintiff was in respect of 6 ½ cents of land. The defendants had obtained Ext.B1 certificate of purchase in respect of the plaint schedule property. The trial court found that the plaintiff had no case that Ext.B1 certificate of purchase was a forged one. It further found that plaintiff failed to show that Ext.A1 certificate of purchase was in respect of the property covered by Ext.B1. Since he failed to establish that fact the suit was dismissed.

4. Challenging the decree and judgment passed by the trial court the appellant/plaintiff filed A.S.No.200/2000 before the Additional District Court, North Paravur. The lower appellate court concurred with the findings of the trial court and found that the appellant/plaintiff failed to establish that there is a property as claimed by him. It further found that the appellant did not take any step to establish the fact that Exts.A1 and B1 are in respect of one and the same property. The lower appellate court also found that the suit property is the property covered by Ext.B1 certificate of purchase and dismissed the appeal. Challenging those concurrent findings the plaintiff/appellant has filed this Regular Second Appeal.

5. At the time of admission this Court had framed the following substantial questions of law:

A. If the plaint schedule property is covered by Ext.B1 sale certificate dt.30.9.1997 and the same was acquired after selling away the property covered by Ext.A1 sale certificate which was admittedly in the joint names of the appellant/plaintiff and his mother, are the defendants who are transferees of the interests of the plaintiff's mother, entitled to claim absolute right over Ext.B1 property?

B. Have not the courts below gone wrong in holding that the plaintiff has no title over the property covered by Ext.B1 which, in law, enures to the persons who are legally entitled to the same?

C. Even if the plaintiff has been at fault in not taking out a commission, are the courts below justified in disposing of the matter without attempting to identify Ext.A1 property and the property covered by Ext.B1?

Notice was issued on the above stated questions of law. Respondents appeared.

6. Heard the appellant and also the counsel for the respondents. The appellant appeared in person has argued that there is only one property and the finding of the courts below that there are two plots is not based on any evidence and it is based on surmises and conjunctures. It is argued that if as a matter of fact Janaki had 8.075 cents of land separately as contended by the respondents, they ought to have produced the document of title in favour of Janaki. It is argued that when exactly that property was purchased, how the property was obtained, what was the sale consideration, etc. were not pleaded or proved by the respondents. It

is also argued that the burden is on the respondents/defendants to establish that the suit property is not one covered by Ext.A1 certificate of purchase.

7. A reading of the substantial questions of law framed in this appeal shows that at the time of admission the submission was that there was a property covered by Ext.A1 certificate of purchase and that property belonged to two persons and that property was sold and using that sale consideration the present suit property was purchased and as such the appellant/plaintiff is entitled to get one half right in the property. But at the time of argument the plaintiff who appeared and argued the matter in person has no such case. The appellant has argued that there is only one property and that property originally belonged to Kalady Devaswom and was outstanding on lease with him and his mother. It is argued that they obtained a joint certificate of purchase in the year 1972. It is also argued that though the extent of the property is stated as 6 ½ cents actually there is excess area of 1.5 cents and is having an extent of 8 cents at present.

8. The plaintiff claimed partition in respect of the suit property on the strength of Ext.A1 certificate of purchase. According to the appellant he is having one half right over the suit property. His mother was having one half right over the property and she executed a will in respect of her one half right in favour of respondents. This case was denied by the respondents. The learned counsel for the respondents has argued that Ext.A1 certificate of purchase is in respect of a different plot. It is argued that after obtaining the certificate of purchase the

plaintiff along with his mother had sold away that property. It is also argued that the plaintiff had filed the suit only to harass them.

9. The case of the appellant is that the suit property originally belonged to Kalady Devaswom. It was outstanding on lease with the plaintiff and his mother. The crucial question arising for consideration in the suit was whether the property covered by Exts.A1 and B1 are one and the same or whether they are two different and distinct plots as claimed by the defendants. It is the appellant who claims partition of the suit property on the strength that the properties covered by Exts.A1 and B1 are one and the same. The only argument advanced by the appellant before me is that the boundaries of both the properties are one and the same and a comparison of Exts.A1 and B1 will show both of the documents were issued in respect of one and the same property. It is argued that Ext.B1 certificate of purchase is of no value since it was issued in respect of the property covered by Ext.A1 certificate of purchase which was issued as early as on 22.4.1972. I have compared the survey number of the property covered by Ext.A1with that of Ext.B1 certificate. The survey number of property covered by Ext.A1 is 231/6A whereas the survey number of the property covered by Ext.B1 is stated as 231/6A Part (Resurvey No.398/26 Part). The western boundary of the property covered by Ext.A1 is stated as garden land whereas the western boundary of the property covered by Ext.B1 was stated as ' '. The eastern boundary of both the properties is stated as road and the southern boundary

was described as garden land in Ext.A1 but in Ext.B1 it was stated as property belonging to Shameela Makkaru and Velayudhan. So with the above stated description it is not possible to hold that the properties mentioned in Exts.A1 and B1 are one and the same.

10. Appellant has pointed out that the word 'garden land' is mentioned in Ext.A1. The property involved in Ext.B1 is also garden land. In Second Appeal it is not possible to find out the identity of the properties covered by the two documents. In view of the contention raised by the defendants the appellant ought to have taken steps to identify the properties covered by Exts.A1 and B1. The trial court in its judgment had stated that the appellant/plaintiff did not place any material to show that Ext.B1 was a forged one. Nowhere in the chief-examination the plaintiff had asserted that the defendants obtained Ext.B1 certificate of purchase in respect of the property covered by Ext.A1. During cross-examination he asserted that the entire 8 cents absolutely belonged to him. Thereafter he admitted that his mother had assigned her one half right over the property in favour of the defendants. He was asked whether Janaki had given 8.075 cents of land to the respondents. His answer was 'yes'. It reads as follows:

He had further admitted that he had no dispute regarding the property given to the respondents by his mother. During re-examination he admitted that 8.075 cents of

land absolutely belonged to his mother and that property is not included in Ext.A1 certificate of purchase. He deposed as follows:

The appellant has argued that he had not made any such admission at the time of evidence and the statement recorded in his deposition was a statement not made by him. The oral evidence of PW1 was referred to in the judgment of the trial court. If as a matter of fact the learned Sub Judge did not record the evidence of PW1 correctly he should have pointed out it at the time of signing the deposition or at least at the time of argument. At any rate, this fact should have been pointed out before the lower appellate court. The plaintiff has come forward with such a case for the first time in the Second Appeal which shows that he has no respect for truth.

11. In view of the admission made by the appellant himself that his mother had 8.075 cents of land and that property she had bequeathed in favour of the respondents the first substantial question of law framed by this Court while admitting the appeal to the effect that the plaint schedule property was purchased after selling the property covered by Ext.A1 certificate of purchase and hence he is entitled to get one half right does not arise for consideration in this appeal at all. The courts below had not committed any error in appreciating the evidence and the finding that the suit property is covered under Ext.B1. In view of the

admission made by the plaintiff the burden is on him to take out a commission to identify the properties covered by Exts.A1 and B1. At the time of argument the plaintiff has not raised a contention that he may be given an opportunity to identify the properties covered by Exts.A1 and B1. So that question of law does not arise for consideration in this appeal. There is no merit in the Second Appeal. It is only to be dismissed.

In the result, appeal is dismissed.

I.A.Nos.2165/2005, 1928/2007, 1929/2007, 1930/2007 and 1931/2007 in RSA No.988/2003 will stand dismissed.

K. PADMANABHAN NAIR,
JUDGE.

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